Filed 7/31/09 P. v. Julius CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN PATTON JULIUS, Defendant and Appellant.	G041706 (Super. Ct. No. SWF017871) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Judson W. Morris, Jr., Judge. (Retired judge of the Los Angeles Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne McGinnis and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

Stephen Patton Julius appeals from his conviction on 20 counts of forcible lewd acts on a child (Pen. Code, § 288, subd. (b)(1))[1], and one count of continuous sexual abuse of a child (§ 288.5), arising from his molestation of his daughter, J.J. He contends: (1) incriminating statements he made to police were obtained in violation of his *Miranda*[2] rights and should have been suppressed; (2) evidence of prior acts of violence committed against his former wife and his children was improperly admitted; (3) the trial court abused its sentencing discretion by imposing consecutive upper terms on each of the counts; and (4) his 176-year sentence constitutes cruel and unusual punishment. We find no merit to his contentions and affirm the judgment.

I

Julius and his now former wife, Brenda Julius (Brenda), were married for 13 years and had four children: sons N.J. and D.J.; and daughters A.J. and J.J. At the time of trial in July 2007, the children's ages were N.J.—17; A.J.—14; D.J. and J.J. (twins)—13. Between 2000 and December 2005, they all lived in a house in the Tuscany Hills neighborhood of Lake Elsinore. The girls often slept with their parents.

Although they often got along well, Julius disciplined the children by hitting and yelling. He frequently drank alcohol and when he drank became angry, violent, and would hit Brenda in front of the children. He frequently struck N.J. and D.J., hit walls, and slammed doors.

In March 2004, Julius and Brenda began sleeping in separate bedrooms. Thereafter, J.J. usually slept with Julius but sometimes she would ask to sleep with N.J. or A.J., telling them she did not want to sleep with Julius. Julius frequently cajoled J.J. into sleeping with him by accusing her of not loving him or saying he would kill himself if she did not sleep with him.

---

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

In February 2005, Brenda took Julius to a hospital for alcohol rehabilitation after a violent incident in which he threatened to kill everyone in the household. D.J. confirmed he heard Julius say, "'I'll kill you all.'" Julius did not remain in the rehabilitation program and returned to the house the next day. Brenda filed for divorce and Julius moved out.

Subsequently, Brenda was evicted from the Tuscany Hills house and moved in with her parents in Palm Springs. She agreed the children could live with Julius during the school week. Julius moved into another house in Lake Elsinore.

J.J. testified that beginning when she was nine or 10 years old, when they lived in the Tuscany Hills house, Julius began touching her vagina and breasts while they were in bed together. The touching continued at each of the houses they lived in, happening 20 to 30 times.[3] Although the touching usually was on top of her clothing, J.J. testified that sometimes Julius would tell her to remove her clothes because it was hot, and to lay on the bed with him and he would touch her breasts and vagina. If she refused, he would get mad at her. When she tried to move away, he would hold her around her stomach. A.J. testified that once when she was about six years old she was sleeping in Julius's bed and he asked her to take off her clothes and lay on top of the bed with him because it was hot. She did not.

None of J.J.'s siblings ever saw Julius touch J.J., and she never told any of them about the touching. J.J. said she was scared of Julius because he hit Brenda and the other children, he drank a lot, and became angry and yelled when he drank. She slept with him to keep him from getting mad at her. She was embarrassed and thought she was maybe partially at fault for the touching. J.J. feared Julius would hurt her if she told anyone, so she said nothing about the inappropriate touching.

---

[3] Because there is no substantial evidence challenge, we need not discuss the offenses in great detail.

A friend of J.J.'s testified that once when she spent the night at J.J.'s house, Julius came in and asked J.J. to come sleep with him. When J.J. and the friend went to A.J.'s room to sleep, Julius became angry and slammed the door. On a different sleepover occasion, Julius invited J.J. and the friend to sleep with him, which they would not do. Another time, the friend saw Julius give J.J. a hug, during which he rubbed his hands over J.J.'s breasts and vaginal area, and J.J. looked scared.

In May 2006, Brenda observed J.J. was becoming clingy and refusing to go to Julius's. Although J.J. told Brenda that Julius had been "touching" her, Brenda did not pursue the matter at first—not wanting to know about it. J.J. then began displaying stress behavior including self-mutilation (cutting and burning herself), breaking out in hives, and not bathing or eating properly.

In August 2006, J.J. again told her mother about Julius's touching her and this time Brenda contacted the police. She also obtained a temporary restraining order (TRO), forbidding Julius to have contact with her or any of the children, but he continued to send e-mails to A.J.

Julius was interviewed by the police on August 31, 2006. We discuss Julius's police interviews in greater detail in part II. Julius admitted to the police that between March and May 2006, he touched J.J. on her breasts and vagina numerous times—both on top and underneath of her clothing. Julius denied he had any sexual intent in touching his daughter. Rather, Julius said, he liked for J.J. to sleep and cuddle with him because he was sad and lonely and it "felt good." And sometimes his hand would just "wander around" and touch the child's breasts and vagina.

A psychologist testified about "Child Sexual Abuse Accommodation Syndrome." In short, it was common for a child sexual abuse victim to keep the abuse secret and to feel ashamed or responsible for the abuse.

Information, Verdicts & Sentence

Julius was charged with 20 counts of forcible lewd acts on a child (§ 288, subd. (b)(1)), by use of force, duress or fear, and he was charged with one count of continuous sexual abuse of a child (§ 288.5). Aggravating factors were alleged including that the victim was vulnerable, the crime was committed with planning and sophistication, and Julius took advantage of a position of trust. The jury found Julius guilty on all counts and, in a court trial, the court found true all the aggravating factors. The court imposed the upper term of 16 years for continuous sexual abuse of a child, plus consecutive upper terms of 8 years on each of the 20 forcible lewd acts count, for a total term of 176 years.

II

Julius contends the court erred by denying his motion to suppress incriminating statements made in an interview with police on August 31, 2006. He contends his waiver of his *Miranda* rights was not voluntary, knowing, and intelligent because he had invoked his right to counsel during an interview that took place one week earlier and the police did not honor that request. We conclude the trial court properly denied the motion to suppress. We begin with the facts concerning the circumstances surrounding the two police interviews, and the statements made in the course of both.

On August 24, 2006, Julius voluntarily went to the Lake Elsinore Police Department and was interviewed by Detective James Rayls. Another officer was present during parts of the interview. Throughout the interview Julius denied J.J.'s allegations about inappropriate touching, explained he was trying to figure out why J.J. would have made the allegations, and expressed concern over how he could get her back in his custody. Julius discussed with the officers an upcoming court hearing concerning the TRO Brenda had obtained. Julius mentioned he did not have an attorney but was going to get one.

Rayls mentioned discussions he and Julius apparently had about Julius taking a polygraph test. Julius replied he had nothing to hide. Rayls commented Julius could get an attorney if he wanted one, but most attorneys would advise against taking a polygraph

test. Julius asked if he should "[take] the fifth," and Rayls replied he could not offer legal advice. Julius said he wanted to take a polygraph test immediately because he had nothing to hide.

There were further discussions about Julius's family life, and Julius continued to deny the allegations and insist he wanted a polygraph test. Julius made more references to his possibly getting an attorney. When the second officer commented a polygraph test could determine if Julius was telling the truth, Rayls commented that if Julius was telling the truth "it's gonna go away . . . ." Rayls said to Julius, "if I thought you were lying right now . . . I'd book ya, okay, but I'm not doing that. I'm giving you the benefit of the doubt. Let's do the polygraph, okay." Julius continued to insist he wanted to take the polygraph test as soon as possible.

Julius and the officers continued to discuss Julius's perceptions about his home life, Julius's close relationship with his children, and Brenda's abrupt (and in Julius's view unexplained) abandonment of the family, and its emotional toll on the children. There were additional references to Julius taking a polygraph test. Julius told the officers to "do what you have to do," and Rayls replied, "let's do the polygraph, let me talk to them, I'll start putting it together . . . ." The following discussion took place:

"[Julius]: I will keep in touch with you and you keep in touch with me. I am going to tell you I am getting an attorney.

"[Rayls]: That's fine.

"[Julius]: Damn right I got to get an attorney. He wants [a $4,000] retainer. I don't know, you know.

"[Rayls]: Well, well.

"[Julius]: Where am I going to get [$4,000]? But I . . .

"[Rayls]: Why don't you wait until after the polygraph okay and see, okay?

"[Julius]: Are you being honest with me now? [¶] . . . [¶]

"[Rayls]: I'm wait[ing] for the polygraph to find out what's going on. . . ."

Rayls told Julius he would wait until the polygraph test was done before referring the matter to the district attorney. He suggested that if Julius passed the polygraph test, the district attorney might just turn the matter over to Child Protective Services (CPS) and explained to Julius how CPS handled such matters.

Rayls then told Julius "all you got to do is just get the polygraph done and that's it." He told Julius he should not invest in a lawyer at this stage because a lawyer would probably either discourage him from taking the polygraph, or make him pay for the test. Rayls told Julius "[w]hat you need to do, that's the polygraph, . . . '[c]ause [*sic*] if this thing blows over and it's gone, that's gonna have no bearing on whether you get custody of your kids, okay?" As the interview ended, Rayls again suggested to Julius he should not go into debt getting an attorney until it appeared he was going to be arrested.

August 31, 2006, Interview

On August 31, 2006, Julius voluntarily presented himself at the police station for a polygraph test to be performed by a Secret Service Agent. Julius was given oral and written advisement of his *Miranda* rights and he signed a written waiver of those rights. The interview following the polygraph test was recorded; the test and discussions beforehand were not.

Apparently, the polygraph test did not go well for Julius. Afterwards Rayls and the Secret Service Agent interviewed him at length. Julius admitted that between March and May of 2006, on eight to 10 occasions, he had "cuddle[d]" with J.J. Julius explained he was very lonely after Brenda left, and had not had sex with a woman for a long time. Julius said sometimes while he was in bed with J.J. next to him, his "hand would wander around her breast or something . . . ." Sometimes he put his hand under J.J.'s clothes and rubbed her breast and vagina. Julius denied he ever penetrated J.J.'s vagina and never had sexual intercourse with her. Julius denied he received any sexual gratification from touching J.J.

Ruling

In ruling on Julius's suppression motion, the court found that during the August 24 interview, Julius invoked his constitutional right to counsel. Although Julius was not "technically" in custody during that interview, "it became clear from the dialogue that he was going to be in custody if he didn't agree to take the polygraph." However, the court found the passage of time (seven days), the fact Julius came back voluntarily, the fact he was given his *Miranda* rights and waived those rights, removed any taint. Accordingly, the court found the statements Julius made during the polygraph test and afterwards were admissible.

Discussion

"It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. [Citation.]" (*People v. Neal* (2003) 31 Cal.4th 63, 79 (*Neal*).) To realize this right, and in recognition of the fact that "any statement obtained from a criminal suspect by a law enforcement officer during custodial interrogation is potentially involuntary because such questioning may be coercive" (*ibid.*), the United States Supreme Court ruled that prior to custodial interrogation, law enforcement officers must advise individuals concerning their rights, including the right to counsel and to remain silent. (*Miranda, supra*, 384 U.S. at p. 444.)

When during a custodial interrogation a defendant invokes the privilege against self-incrimination and the right to counsel, law enforcement officers are constitutionally obligated to refrain from further interrogation until the defendant's counsel is present or until the defendant initiates a discussion of the subject of the interrogation and waives his or her *Miranda* rights. (*Miranda, supra*, 384 U.S. at p. 474; *Edwards v. Arizona* (1981) 451 U.S. 477, 485 (*Edwards*).) "[A]n accused . . . having expressed [a] desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

communication, exchanges, or conversations with the police." (*Edwards, supra,* 451 U.S. at pp. 484-485.)

Whether a defendant's constitutional rights were violated, whether any initiation of conversation was voluntary and uncoerced, and whether the defendant voluntarily, knowingly, and intelligently waived the right to counsel are reviewed de novo based on the facts found by the trial court. (*People v. Storm* (2002) 28 Cal.4th 1007, 1022-1023 (*Storm*); *People v. Waidla* (2000) 22 Cal.4th 690, 730 (*Waidla*).) "On appeal, the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently in light of the record in its entirety, including 'all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation' [citation]." (*People v. Benson* (1990) 52 Cal.3d 754, 779.)

The gist of Julius's argument is that during the un-*Mirandized* August 24 interview, he invoked his constitutional right to counsel. Thus, any future interrogation without counsel was a violation of the rule of *Edwards, supra,* 451 U.S. at pages 484-485, and therefore, his statements made during the August 31 interview were not voluntary. Julius also suggests his statements during the August 31 interview were coerced as the interview took place only because of threats and promises made during the August 24 interview.[4]

We need not address the Attorney General's contention the trial court incorrectly concluded the August 24 interview was a custodial interrogation. (See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161 ["*Miranda* advisements are required only when a person is subjected to 'custodial interrogation'"].) Assuming, without deciding, the

[4] Julius argues the threat was that he would be arrested if he did not agree to submit to a polygraph test. But we find no such statement by the officer. Rather, in the face of Julius's denials, the officer told Julius that if the officer thought Julius was lying at that time, he would have arrested him. Julius asserts the promise that was made was if he passed the polygraph, the officer would let CPS handle the matter. Again, that is not what was said. The officer said the polygraph results would be given to the district attorney and if Julius passed, the district attorney would likely turn the matter over to CPS to investigate.

August 24 interview was a custodial interrogation during which Julius invoked his right to counsel, the trial court correctly concluded any "taint" arising from that interview was removed due to the passage of time.

Storm, supra, 28 Cal.4th 1007, is instructive. In that case, in the course of the investigation of his wife's murder, defendant volunteered to undergo a polygraph test at the police station. Defendant was given *Miranda* warnings but in the course of the test, he invoked his right to counsel. (*Storm, supra,* 28 Cal.4th at p. 1012.) The polygraph operator did not terminate the questioning, and instead encouraged defendant to continue talking, thus violating *Edwards, supra,* 451 U.S. 477. Defendant admitted he killed his wife but claimed it was an assisted suicide. (*Storm, supra,* 28 Cal.4th at p. 1012.) Realizing their mistake in continuing the interrogation, the police released defendant. Two days later, police interviewed defendant at his home, without administering new *Miranda* warnings, and defendant provided a more detailed version of his wife's killing. (*Storm, supra,* 28 Cal.4th at p. 1012.) The Supreme Court upheld the admission of the later home interview into evidence, concluding the interview occurred in a noncustodial setting to which *Miranda* protections do not apply, the "'break-in-custody'" exception to the *Edwards* "no-recontact rule" governed, and thus new *Miranda* warnings were not required to dissipate the taint from the prior *Miranda* violation. (*Storm, supra,* 28 Cal.4th at pp. 1012-1013.)

With regards to the break-in-custody rule, *Storm* explained that under *Edwards, supra,* 451 U.S. 477, "once a suspect in custody invokes his *Miranda* right to counsel, his or her subsequent statements to police are presumed involuntary and inadmissible if obtained pursuant to an 'encounter [initiated by the police] in the absence of counsel (*assuming there has been no break in custody*).' [Citation.]" (*Storm, supra,* 28 Cal.4th at p. 1023.) Noting that "California cases uniformly have held or assumed that the rule barring police recontact after a *Miranda* request for counsel applies only during continuous custody[,]" the *Storm* court also explained that "[t]he special protections of

Miranda and *Edwards* apply only to persons questioned in the coercive atmosphere of *police custody*. The *Edwards* no-recontact rule guards against police badgering designed to wear down a suspect who *remains in custody* after invoking his *Miranda* right to counsel during custodial questioning." (*Storm, supra,* 28 Cal.4th at pp. 1012-1013, 1023.)

In *Storm* two days passed between defendant's first interrogation (in which *Miranda* and *Edwards* were violated), and the second interview in which further incriminating statements were made. The Ninth Circuit has held similar breaks in custody obviated the *Edwards* no re-contact rule. (*United States v. Hines* (9th Cir. 1992) 963 F.2d 255, 257 [two-day break in custody dissipated taint]; see also *United States v. Coleman* (9th Cir. 2000) 208 F.3d 786, 790 [five-day break].)

Julius's reliance on *Neal, supra,* 31 Cal.4th 63, is misplaced. In *Neal*, there was no break in custody. During a properly *Mirandized* interview, defendant, an immature 18-year-old with minimal education and low intelligence, repeatedly invoked his right to counsel and to remain silent, but police continued questioning him at length promising him leniency if he cooperated. (*Id.* at pp. 73, 78.) Defendant was then arrested, placed in a jail cell, and held incommunicado overnight without food, water, or any opportunity to use the bathroom. The next day, defendant agreed to talk, was again given his *Miranda* rights, and proceeded to confess. (*Id.* at p. 74.) He remained in custody and not until after a third interview several hours later, was he given anything to eat—"after more than 24 hours in custody, and more than 36 hours since his last meal." (*Id.* at p. 76.)

Here, seven days passed between the August 24 interview with Julius and the August 31 interview in which he admitted engaging in sexual conduct with his daughter. There is no suggestion that in the intervening time Julius was ever in custody. We recognize that unlike *Storm*, where the second interview took place in defendant's home, here Julius's second interview took place at the police station. But he voluntarily went to the police station the second time and was given his *Miranda* rights prior to that interview.

The substantial break in custody dissipates any taint arising from alleged improprieties in the first interview.

III

Julius contends the trial court erred by admitting evidence of violence directed at Brenda and his children. We find no error.

At the beginning of trial, there was discussion about the admissibility of evidence concerning domestic violence and physical abuse. The prosecutor argued the evidence was admissible to establish forcible lewd acts on a child by use of force, duress, or fear. (§ 288, subd. (b)(1).) Defense counsel agreed the evidence was probative on that issue but should be excluded under Evidence Code section 352 as it was unduly prejudicial. The trial court ruled the evidence was highly probative on the issue of force, duress, or fear, it was not unduly prejudicial, and the probative value outweighed the prejudice. Accordingly, the court ruled the evidence admissible.

In the course of the trial the following evidence was admitted about which Julius now complains. When Julius drank, he became violent, angry, and unpredictable, and he hit Brenda. J.J. witnessed these violent episodes and she became frightened of and upset with Julius when he hit Brenda. She was scared Julius would hurt Brenda badly, and would hurt her badly as well. D.J. saw Julius hit Brenda, and Julius hit D.J. 20 to 30 times. J.J. witnessed Julius hit D.J., and it made her scared of him. Julius frequently yelled and screamed at N.J., slamming doors and hitting walls, and would hit N.J. These incidents often occurred in J.J.'s presence. N.J. moved out of Julius's home because he was scared of Julius. In February 2005, Brenda took Julius to the hospital for alcohol rehabilitation after an incident in which he was chasing her around the house in front of the children and threatening to kill them all. D.J. too testified Julius had threatened to kill them all.

In closing argument, the prosecutor argued he had proved the repeated molestations were accomplished by duress because there was an implied threat to J.J. of force or violence by her father if she resisted. The prosecutor argued that in view of the

parent-child relationship, the fact Julius had already been violent and "beat up everybody else in the house[,]" J.J. was actually and reasonably afraid of her father.

Julius now contends the evidence of his acts of violence against his wife and children was propensity evidence and thus inadmissible under Evidence Code section 1101, subdivision (a), which provides "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." He further contends this propensity evidence was not made admissible by Evidence Code section 1109. That section provides, subject to Evidence Code section 352, in a criminal action charging domestic violence, evidence of defendant's prior acts of domestic violence is not inadmissible under Evidence Code section 1101, and in a criminal action charging child abuse, evidence of defendant's prior acts of child abuse is not made inadmissible by Evidence Code section 1101. (Evid. Code, § 1109, subds. (a)(1) & (c).)

Julius argues Evidence Code section 1109 is unconstitutional on its face,[5] and when subject to an Evidence Code section 352 analysis, the prejudicial impact of the evidence outweighed its probative value.

---

[5] Julius contends it violates federal due process rights to a fair trial to allow a defendant to be convicted on the basis of character or propensity evidence, and the fact the admissibility of the evidence is subject to exclusion under Evidence Code section 352, does not satisfy due process. In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), our Supreme Court rejected the identical argument with regards to a parallel statute, Evidence Code section 1108, which addresses admissibility of evidence of prior "sexual offenses." (*Falsetta, supra*, 21 Cal.4th at pp. 907-908, 910-922.) Julius contends *Falsetta* is wrong, but we are of course bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Since *Falsetta* was decided, four appellate court decisions have concluded *Falsetta* guides the analysis as to the constitutionality of Evidence Code section 1109, and have upheld the constitutionality of Evidence Code section 1109 against similar due process challenges. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310 (*Jennings*); *People v. Brown* (2000) 77 Cal.App.4th 1324, 1331-1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1025-1030; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-420.) "We agree with the reasoning and the results in these cases, and adopt their analyses as our own. In short, the constitutionality of [Evidence Code] section 1109 under

We need not concern ourselves with Julius's contention the evidence was inadmissible character or propensity evidence. Preliminarily, we note Julius did not object to the admissibility of the evidence on these grounds, waiving the argument on appeal. (Evid. Code, § 353, subd. (a).)

Furthermore, the evidence was not offered to prove Julius's "character or a trait of his or her character . . . to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) The evidence of Julius's violent acts against other members of his household was offered to prove a relevant fact, namely, that J.J. feared her father, not to prove he had a criminal disposition. (See Evid. Code, § 1101, subd. (b).)

Julius was charged under section 288, subdivision (b)(1), which provides: "Any person who commits an act described in subdivision (a) by use of *force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim* or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years." (Italics added.)

"[D]uress involves psychological coercion. [Citation.] Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.]" (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.) "'Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to the existence of duress. [Citation.]" (*Ibid.*) And when sex acts are committed on a child by a parental authority figure "against a background of . . . violence, . . . the circumstances [may] suggest[ ] an implied threat of harm" if the victim fails to submit. (*People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1580 (*Wilkerson*).)

In *Wilkerson*, the force element was supported by evidence the victims were afraid of defendant (their grandfather) because of his history of getting drunk and behaving

---

the due process clauses of the federal and state constitutions has now been settled." (*Jennings, supra*, 81 Cal.App.4th at p. 1310.)

violently: "[T]he [trial] court could reasonably conclude that the acts committed by [defendant], who occupied a position of authority as to each victim, occurred against a background of his drinking and violence, that the circumstances suggested an implied threat of harm if the girls refused [defendant's] advances, and that the girls acted, at least partly, from fear induced by the implied threat." (*Wilkerson, supra,* 6 Cal.App.4th at p. 1580.) Thus, the evidence of Julius's violent acts that were often witnessed by J.J was admissible to prove the force or duress element of the charged crimes.

We reject Julius's contention the evidence should have nonetheless been excluded under Evidence Code section 352. "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 (*Rodrigues*).) A trial court's exercise of its discretion under Evidence Code section 352 "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*Rodrigues, supra,* 8 Cal.4th at p. 1124.)

As the court noted, the evidence of Julius's violent behavior was highly probative on the issue of duress—it established J.J. was in fear of her father and submitted to his acts because she feared he would hurt her if she refused. Although it involved a significant amount of trial time, the evidence concerned one of the significant issues in the case—whether there was an implied threat to J.J. Prosecution evidence is by its very nature prejudicial. For Evidence Code section 352 purposes "[e]vidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.' [Citation.]" (*Waidla, supra,* 22 Cal.4th at p. 724.) We cannot say the court abused its discretion by finding the evidence was substantially more probative than prejudicial.

We reject Julius's contention the trial court erred by not giving a limiting instruction advising the jury the evidence concerning Julius's violent acts towards his family could be used only to prove J.J. was in fear of her father—not to prove he had a propensity to commit crimes. No such instruction was requested, and the trial court had no sua sponte duty to give such an instruction. (See Evid. Code, § 355; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316.)

IV

Julius contends the court abused its discretion by imposing consecutive upper terms on all counts, resulting in a sentence of 176 years. He also contends his sentence constitutes cruel and unusual punishment. We reject both contentions.

Aggravated Sentence

Because Julius was convicted of numerous counts of committing forcible lewd or lascivious acts on a child (§ 288, subd. (b)(1)), and continuous sexual abuse of a child (§ 288.5), his sentencing was governed by section 667.6, subdivision (d), which provides, "A full, separate, and consecutive term shall be served for each violation . . . if the crimes involve . . . the same victim on separate occasions." The information alleged, and in a bifurcated trial the court found true, the following aggravating circumstances: that the victim was particularly vulnerable, the crime was committed with planning and sophistication, and Julius took advantage of a position of trust and confidence. (Cal. Rules of Court, rule 4.421(a).) The only mitigating factor the court found present was Julius's lack of a prior criminal record. (Cal. Rules of Court, rule 4.423(b).) The court found the aggravating circumstances outweighed the mitigating circumstances and imposed consecutive upper terms on each count—16 years for continuous sexual abuse of a child; 8 years on each of the 20 forcible lewd acts counts—for a total term of 176 years.

Conceding consecutive terms were required, Julius contends the court abused its discretion by imposing upper terms. He argues that due to the mitigating circumstances—in particular that he had no prior criminal record, the force or duress used

was minimal, and J.J. did not complain about the molestations for "years"—the court should have imposed the lower terms, which would have resulted in a 66-year sentence instead.

Sentencing choices are reviewed for abuse of discretion and "'will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.) "A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*Ibid.*)

We have reviewed the record and it is apparent the court carefully considered all the relevant facts in selecting its sentence. The court reviewed each of the aggravating factors, and the one mitigating factor it found applicable—lack of a criminal record—and concluded, "I'm absolutely convinced that the aggravating circumstances in this case far outweigh any mitigation." We cannot say the court abused its discretion in selecting the upper term.

Cruel & Unusual Punishment

For the first time on appeal, Julius contends his 176-year sentence constitutes cruel and unusual punishment in violation of the federal and state Constitutions. It is well established that cruel and unusual punishment arguments must be raised in the trial court because they require fact-specific determinations about the offense and the offender. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229 (*Norman*); *People v. Kelley* (1997) 52 Cal.App.4th 568, 583 (*Kelley*).) Accordingly, Julius has waived the issue by failing to raise it below.[6] (*Norman, supra,* 109 Cal.App.4th at p. 229; *Kelley, supra,* 52 Cal.App.4th at p. 583.)

---

[6] In footnote 4 of his opening brief, Julius urges the cruel and unusual punishment issue was adequately raised because it is implicit in his trial counsel's "request to strike a prior" from which "it is obvious, he tried and his best to limit appellant's sentence to a 25-year-to-life sentence." However, no such argument or request was made below. Julius had no prior convictions to strike. Indeed, counsel's argument was Julius's lack of

Even were the argument properly raised, it is without merit. In assessing a cruel and unusual punishment claim, "We decide whether the penalty given 'is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity,' thereby violating the prohibition against cruel and unusual punishment of the Eighth Amendment of the federal Constitution or against cruel or unusual punishment of article I, section 17 of the California Constitution. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1042.)

We evaluate a cruel and unusual punishment claim under the three factors set forth in *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*). (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510.) The factors include: (1) "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society" (*Lynch, supra,* 8 Cal.3d at p. 425); (2) a "compar[ison of] the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses* which, by the same test, must be deemed more serious" (*id.* at p. 426); and (3) "a comparison of the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision" (*id.* at p. 427). Julius bears the burden of establishing the punishment is unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.)

As to the first *Lynch* factor, when evaluating the offense we look at "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*People v. Dillon* (1983) 34 Cal.3d 441, 479.) When evaluating the particular offender, we focus on "individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

---

any prior criminal record was a mitigating circumstance and the court should impose a lower term on each count limiting his sentence to 66 years. We assume appellate counsel inadvertently cut and pasted this footnote from another brief.

When arguing for a mitigated sentence below, Julius emphasized his lack of criminal record, his employment history, and his generally positive involvement in his children's lives. He also pointed to the role his alcoholism and despondency over his pending divorce played in his commission of the offenses. But such factors are not necessarily dispositive. (See *People v. Alvarado* (2001) 87 Cal.App.4th 178, 199-200 [life term constitutional despite defendant's age, lack of record, and remorse]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 528-532 (*Bestelmeyer*) [129-year term for multiple sexual offenses constitutional despite lack of prior record and mental impairment].) Julius attempts to minimize the severity of the crimes of which he was convicted. His argument ignores he was convicted of 21 counts of serious sex offenses involving his preteen daughter that occurred over a number of years. He took advantage of his parental authority to inflict the harm upon his young daughter for his own personal gratification. And he ignores the potential long-term emotional and psychological damage that may result from repeated sexual offenses committed against young children by trusted adult members of their own family.

Applying the second *Lynch* prong—comparison with different and possibly more serious offenses—Julius's argument similarly fails. Although his sentence is tantamount to one of life without possibility of parole, similar sentences for multiple sex offenses have been routinely upheld when challenged as unconstitutionally disproportionate. (See, e.g., *People v. Wallace* (1993) 14 Cal.App.4th 651, 666-667 [283-year sentence for 46 sex crimes against seven victims]; *Bestelmeyer*, *supra*, 166 Cal.App.3d at p. 532 [129 years for 25 sex crimes against one victim].) "Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalty is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will. [Citation.] Punishment is not cruel or unusual merely because the Legislature may have chosen to permit a lesser punishment for another crime.

Leniency as to one charge does not transform a reasonable punishment into one that is cruel or unusual. [Citation.]" (*Bestelmeyer, supra,* 166 Cal.App.3d at pp. 530-531.) "Because it is the Legislature which determines the appropriate penalty for criminal offenses, defendant must overcome a 'considerable burden' in convincing us his sentence was disproportionate to his level of culpability. [Citation.]" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.) Julius has offered no analysis of the third *Lynch* prong (i.e., punishment is excessive when compared with punishments for similar crimes in other jurisdictions). He has therefore failed to meet his burden of establishing that the punishment was cruel and unusual. (*People v. King, supra,* 16 Cal.App.4th at p. 572.)

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.